Filed 10/20/09 Estrada v. Delhi Community Center CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AURELIA HORTENSIA ESTRADA,	
Plaintiff and Appellant,	G040405
v.	(Super. Ct. No. 06CC12880)
DELHI COMMUNITY CENTER et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee and David A. Thompson, Judges. Judgment affirmed; motions for sanctions denied.

James Toledano for Plaintiff and Appellant.

Charlston, Revich & Wollitz and Tim Harris for Defendants and Respondents.

As a sanction for her repeated discovery abuses, after prior lesser sanction orders were imposed and ignored, the trial court issued a terminating sanction dismissing Aurelia Hortensia Estrada's wrongful termination/sexual harassment/emotional distress action against her former employer, Delhi Community Center (Delhi), its board of directors (the Board), and its executive director, Irene Martinez. Estrada contends: (1) Respondents were not entitled to the discovery ordered by the court because under collateral estoppel principles, a prior judgment in a Code of Civil Procedure section 527.6[1] proceeding denying Martinez an injunction against Estrada for alleged harassment resolved all liability issues; (2) the court erroneously found Estrada had destroyed potential evidence by installing a new operating system on her computer, with the knowledge that doing so would delete files from the computer, after she had agreed to produce the computer during discovery; (3) the court abused its discretion by imposing monetary sanctions against Estrada's attorney; and (4) the terminating sanction was the result of the cumulative errors of the trial court in its earlier discovery orders. Additionally, Estrada has filed a motion requesting we award her sanctions against Respondents' counsel for alleged deficiencies in the Respondents' brief, and Respondents have requested sanctions against Estrada for having filed a frivolous sanctions motion. We affirm the judgment and deny the motions for sanctions.

I

FACTS

Related Case: Antiharassment Proceeding

On April 5, 2007, we filed our unpublished opinion in *Martinez v. Estrada* (G036365), affirming an order denying Martinez's application under section 527.6 for an injunction against Estrada prohibiting harassment. We briefly summarize the dispute and ruling as described in that opinion.

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Martinez is the executive director of Delhi, a nonprofit organization in Santa Ana. Martinez hired Estrada, who is openly homosexual, around 1995. Eventually, Estrada became Martinez's executive assistant. On June 10, 2005, Martinez fired Estrada, and a few days later filed a section 527.6 application for an injunction against Estrada prohibiting harassment.

At the hearing on the application, Martinez testified that after she and Estrada began having an affair in May 2003, Estrada became increasingly possessive of Martinez, had anger problems, and would fly into rages being physically and verbally abusive towards Martinez. Estrada demanded Martinez leave her husband, which Martinez eventually did in August 2004. Estrada constantly tried to control Martinez's work environment, created conflict in the workplace, and was jealous of coworkers. Estrada began threatening to destroy Martinez's reputation and career by "out[ing]" her. In June 2005, Estrada was making incessant cellular telephone calls to Martinez leaving threatening messages and coming to Martinez's house. Martinez fired Estrada on June 10 and wanted a temporary restraining order and injunction to keep Estrada away from her and her family.

Estrada told a very different version of the events. It was Martinez who began actively pursuing a sexual relationship with Estrada beginning in 2000. Although they were close friends, Estrada was not interested in a sexual relationship. But Martinez was possessive and demanding and would become angry with Estrada when she did not make herself "available" to Martinez. At some point, Martinez became involved in Estrada's efforts to obtain an immigration "green card," and paid Estrada's legal fees for the application. Martinez then began showering Estrada with even more unwanted sexual attention at work, causing workplace problems. Estrada accompanied Martinez on several trips but only went because she felt she had to. In June 2005, after Estrada complained to Martinez about how Martinez's sister (also a Delhi employee) conducted herself in the office, Martinez got angry with Estrada. On June 10, Martinez did not take

Estrada to a work related meeting Estrada understood she was to attend. Estrada became upset and tried to confront Martinez, calling her and going to her house. Estrada left a telephone message for Martinez that she was going to complain to the Board about Martinez's conduct and sexual harassment. Martinez fired her.

On September 12, 2005, the trial court, before Judge John L. Flynn, denied Martinez's request for an injunction against Estrada. In its statement of decision, it found testimony of Martinez and her witnesses lacking in "veracity or credibility" and found Estrada's testimony to be "the believable testimony[.]" It found Estrada was dependent on Martinez both for her job and her "immigration and [g]reen [c]ard status" and Martinez had used her superior position to coerce Estrada into a relationship. The court found there was no "credible threat of violence" against Martinez, and Martinez had not proved she was "fearful, alarmed[,] annoyed or harassed" by Estrada's conduct, or that she suffered "substantial emotional distress[.]" The court concluded Martinez fired Estrada because complaints about their relationship had become widespread and Martinez viewed it as detrimental to her job. The trial court concluded Martinez had filed the application for the injunction "as a pre-emptive strike against perceived anticipated legal action by . . . Estrada against . . . Martinez and [Delhi]." On appeal, we affirmed the trial court's order.

The Instant Action

Allegations of Estrada's Complaint

Estrada's complaint was filed on December 13, 2006, against Delhi, Martinez, and individual members of its board of directors. Estrada alleged she had been hired by Delhi in 1995 and Martinez was her supervisor. Beginning in 1999, Martinez began showering Estrada with unwanted attention and favoritism causing animosity among Estrada's coworkers. In 2000, Martinez told Estrada she would assist Estrada with obtaining her green card and Delhi would sponsor her application. In May 2001, Martinez confessed she was in love with Estrada and began forcing herself on Estrada,

making numerous emotional and sexual demands, and demanding she accompany Martinez on trips. Martinez made it clear to Estrada that if she did not submit to Martinez's romantic advances, Martinez would withdraw Delhi's support of Estrada's green card application. Martinez's acts caused Estrada pain, depression, and severe emotional and physical distress. By June 10, 2005, Estrada could not take any more and she demanded Martinez stop pursuing her. Martinez fired Estrada. When Estrada complained to Delhi's Board, they refused to investigate or take action.

Estrada's complaint contained causes of action against all defendants for sexual harassment and discrimination, failure to take reasonable steps to prevent workplace discrimination, wrongful termination in violation of public policy, interference with prospective economic advantage, tortious breach of contract, breach of the covenant of good faith and fair dealing, retaliation, and infliction of emotional distress. She also alleged a cause of action for battery against Martinez alone alleging Martinez engaged in "touching and other nonconsensual physical contact" with Estrada.

Martinez, Delhi, and Delhi director Frank Haydis, were each served with the complaint and filed responsive pleadings. (Hereafter for convenience we will sometimes refer to them collectively as Defendants.) It does not appear Estrada served any of the other named directors.

A Tortured Discovery Process

In December 2005, counsel for Defendants, Tim Harris, e-mailed Estrada's counsel, James Toledano, "request[ing] that . . . Estrada save, maintain, retain and not alter, modify, delete or change any data relating to this claim, including but not limited to her personal computer." Toledano replied, "Based on your assurances that . . . Martinez will do likewise with respect to all of the computers on and from which any relevant communications were made or data stored, both at home and at Delhi, I will do as you request."

On March 28, 2007, Defendants filed the first round of motions to compel Estrada to respond to special interrogatories, form interrogatories, a document production request, and requests for admissions. Harris explained the discovery requests had been served January 22, 2007, and responses were due February 23. In early February, Estrada's counsel, Toledano, asked for an extension of time due to his father's recent death. Harris agreed to a continuance to March 15. In early March, Toledano asked for further extension to March 30. Harris declined. Harris contacted Toledano on March 16 and inquired about the responses. Toledano advised Harris there was "no legitimate reason for [him] to be insisting on discovery responses in light of the fact of what I am dealing with. If the judge feels differently I will deal with it. You will have your responses when I am able to complete them." On March 19, Harris again inquired about the discovery responses. Toledano replied, "I have other cases far closer to trial with more serious deadlines, I will do my best, but I will not be able to meet your unreasonable, unfeeling and clearly pre-emptive deadlines." On March 20, Harris again asked Toledano about the discovery responses. Toledano told Harris no discovery responses would be forthcoming as he was preparing another case for trial in Boston.

On April 17, Estrada filed opposition to the discovery motions arguing Harris's refusal to grant further continuance of time for discovery in view of Toledano's personal situation and the demands of his other cases was unreasonable. As of April 23, Estrada still had not responded to any of the discovery requests.

On April 26, the day before the hearing on the motions to compel, Estrada served discovery responses. At the hearing on April 27, the court, before Judge David A. Thompson, ruled the defense motions were moot, but imposed $750 in sanctions against Toledano. The trial was set for December 3, 2007.

In early May 2007, Defendants filed additional motions to compel further responses to discovery requests. Estrada was refusing to answer questions about prescription medications or to identify mental health providers, citing privacy concerns.

Estrada had failed to turn over several categories of documents. Significant to the issues on this appeal, Defendants had requested "[a] copy of the entire hard drive of all computers, including laptops and personal computers used by [Estrada] since January 1, 2000." Estrada objected to the request on privacy and relevance grounds, but she would nonetheless allow Defendants to copy the hard drive. Harris had been attempting to work out a time to obtain the hard drive and a protocol for copying it, but Estrada was refusing to allow the computer to be removed from her home for this purpose.

On May 16, Estrada filed a motion for protective order to prevent Defendants from taking her deposition and to limit the scope of discovery. Estrada's deposition was originally noticed to take place on February 6, and the deposition notice directed her to produce, among other documents, a copy of her computer hard drive. The deposition was continued numerous times, and Estrada had agreed to May 16 as the date for her deposition. On May 11, Estrada filed notice she would not appear for her deposition. She argued the judgment and this court's opinion in *Martinez v. Estrada, supra,* G036365 had collateral estoppel effect and was determinative on all liability issues in her complaint against all Defendants. Thus, Estrada urged discovery should only be allowed as to damages. Judge Thompson ordered the motions to compel and Estrada's motion for protective order be heard on June 22. The court ordered counsel to meet and confer on all outstanding discovery issues.

On June 19, Estrada took her motion for protective order off calendar and counsel entered into an agreement regarding discovery. They stipulated Estrada would appear for her deposition on July 15, and would provide supplemental responses to various interrogatories and document production requests. Counsel agreed Estrada would produce her computer by June 30, to a defense-designated expert to copy the hard drive onto a disk. The disk would be given to Toledano for his review, and he would have 10 days to identify files he considered nondiscoverable due to privilege, privacy, or relevance. Toledano would then give that list of files to the defense expert who would

prepare a second disk omitting the objectionable files and give the redacted disk to Defendants' counsel (who could then file a motion to compel production of the additional files). On June 22, in view of the stipulation, the court ruled the motions to compel were moot.

On July 25, Defendants filed a motion to continue the December 3, 2007, trial date. In short, they argued Estrada's delays in complying with discovery requests had prevented them from marshalling evidence necessary to file a summary judgment motion. Harris explained Estrada appeared for her deposition on July 13, but the session was inadequate because the document production had been incomplete and Toledano was not available again until August 3. Estrada had been asked to produce photographs, but at her deposition she admitted she had negatives at home which she had not produced.

Additionally, there were problems with discovery of Estrada's computer. Defendants submitted a letter from their computer forensic expert. Estrada had produced her home computer, as agreed, but in attempting to analyze the computer's hard drive, the expert discovered a new operating system had been installed on the computer on February 24, 2007. The expert had been able to copy the current files, but many older files were now in unallocated space on the hard drive making recovery of the data much more difficult. The expert provided Toledano with one disk containing the current documents, and a second disk (on July 23) with the recoverable files dated before the new operating system was installed. Estrada opposed the motion to continue trial, arguing the decision against Martinez in *Martinez v. Estrada, supra,* G036365, precluded the defendants from litigating any liability issues. The court granted Defendants a continuance to February 19, 2008.

On August 23, Defendants filed a motion to enforce the June discovery agreement with regard to Estrada's computer. Although Toledano had been given two disks by the defense computer expert, as of August 6 he refused to provide his list of objections because Estrada's "expert" (who he would not identify) had not had a chance

to review them. Toledano complained to Harris that he could not open the disk files and until the Defendants' expert could provide him with all the files from his client's computer in a readable form, he could not review them. Toledano also accused Harris of having improperly allowed the defense computer expert to conduct an analysis of Estrada's hard drive, when he was only supposed to copy the hard drive. Toledano wrote a letter to the defense expert threatening him with legal action if he provided Defendants' counsel with the disks.

In Estrada's opposition, Toledano accused Harris of having deliberately violated the discovery agreement by letting the expert "analyze" the hard drive instead of simply "copying" it. He accused the defense expert of having damaged or altered the data on the hard drive. Toledano accused Harris of having completely fabricated the claim that Estrada installed a new operating system on her computer so as to hide his own misconduct in damaging the hard drive, and Toledano declared under penalty of perjury the claim Estrada installed a new operating system on her computer hard drive was false.

Estrada filed a second motion for protective order seeking to halt her further deposition. She again argued *Martinez v. Estrada*, *supra*, G036365, had collateral estoppel effect on all liability issues and there was no permissible purpose to allowing her further deposition. Estrada also filed motions to quash subpoena of business records seeking her medical and mental health records, arguing it violated her privacy rights.

Defendants filed another motion to compel further production of documents. Estrada had produced photographs of her and Martinez but at her July 13 deposition admitted she had negatives with additional images at home she had not produced. Despite repeated requests, Estrada was refusing to produce those negative or additional photographs.

Defendants also filed another motion to compel production of documents requested in a further document production requests (prepared after Estrada's initial discovery responses and deposition). Among other things Defendants sought:

(1) documents related to Estrada's purchase of a Windows XP computer operating system; (2) a college business law textbook; (3) a tape recording Estrada claimed she had played for Delhi board member Haydis in which a former Delhi employee named Lopez told Estrada about being harassed by another Delhi employee; and (4) receipts for travel with Martinez that Estrada had paid for.

At the September 21 hearing on Defendants' motions to enforce the June discovery stipulation and compel production of documents, and on Estrada's motion for protective order regarding her further deposition, the court granted the motion to enforce the discovery agreement, and denied Estrada's motion for protective order.[2] Defendants' motion to compel production of records was taken off calendar and the motion to compel regarding production of photograph negatives was set for September 28.

On September 28, the court granted Defendants' motion to compel production of the photograph negatives. It noted the negatives were specifically included in the definition of documents in the document production request, Toledano had made false and misleading representations to Defendants' counsel that Estrada would produce all the documents, and Estrada in her deposition said she had negatives in her possession but did not produce them. The court ordered Estrada to produce the negatives no later than October 8. The court imposed sanctions of $2,340 against Toledano only and

[2] The hearing was set before Judge Thompson. On September 14, the Presiding Judge of the Superior Court gave notice the case was being reassigned to Judge David R. Chaffee for all purposes effective October 1. On September 20, Judge Thompson posted his tentative ruling on the Internet, largely in Defendants' favor, and Toledano filed a document asserting Judge Thompson lacked jurisdiction to conduct any further proceedings in the case due to the order reassigning the case to Judge Chaffee effective October 1. At the hearing on September 21, Judge Thompson chastised Toledano for having obviously filed the objection document after he saw the court's unfavorable tentative, and threatened him with contempt. The court also issued an order to show cause (OSC) regarding sanctions under section 128.7 against Toledano for having filed objections to Judge Thompson's jurisdiction and ordered the OSC to be heard by Judge Chaffee. The OSC was heard by Judge Chaffee at the same time as the final motion for terminating sanctions that resulted in dismissal of this action. He did not impose any further monetary sanctions against Toledano.

observed, "Toledano has been admonished on the record at no less than four separate ex parte or motion hearings regarding his misuse of the discovery process in this case, but his improper conduct has increased rather than abated." The same day, Defendants filed an ex parte application for an order compelling Estrada to appear at her continued deposition on October 10.

On October 2, Estrada filed opposition to Defendants' motion to compel discovery concerning computer operating system purchase documents, textbook, and the Lopez tape recording. She again argued none of the evidence sought was relevant because of the collateral estoppel effect of *Martinez v. Estrada*, *supra*, G036365, on all liability issues in this case. Estrada represented there were no documents concerning purchase of the Windows XP operating system that she allegedly had installed on her home computer and emphatically denied she had installed a new operating system on her home computer calling it "a complete invention" by Defendants. Estrada argued the college textbook was irrelevant. Estrada argued the Lopez tape was irrelevant.

On October 3, Defendants filed their first motion for terminating or issue preclusion sanctions. They argued despite Estrada's claims for emotional distress damages, she still refused to identify doctors who have treated her or any witnesses to her emotional distress. Estrada threatened to not appear at her continued deposition, and had altered the hard drive on her computer.

On October 5, Judge Chaffee denied Estrada's motion to quash subpoenas for her medical records ruling the records were relevant and essential in defending against Estrada's alleged injuries. The court granted Defendants' motion to compel Estrada's deposition.

On October 9, Defendants filed motions to compel further interrogatory discovery responses, set for hearing in November. Estrada refused to provide the name of the attorney she allegedly consulted regarding her green card application, claiming the information was privileged. She refused to answer interrogatories concerning any

witnesses to her claimed emotional distress and what physical contact with Martinez was objectionable to her on grounds the questions invaded her privacy. Defendants also filed a notice that Estrada refused to comply with Judge Thompson's September 28 order compelling her to produce photograph negatives. Toledano took the position it was not necessary to comply with Judge Thompson's discovery orders because he intended to file a writ petition challenging them.

On October 12, Judge Chaffee granted Defendants' motions to compel production as to travel receipts and gifts. As to computer purchase documents, college textbooks, and the Lopez tape, the court denied the motions because defendants had not established relevancy.

On October 16, Estrada filed her opposition to the first motion for terminating sanctions, in which Toledano continued to deny Estrada installed a new operating system on her computer hard drive or did anything to damage any data on her hard drive. But in Defendants' reply, Harris explained that at Estrada's continued deposition on October 10, she testified that in February or March 2007, she took her computer to a Fry's Store because it was making noises and upon a Fry's employee's recommendation had a new operating system installed. Estrada testified she had invoices and paperwork related to installation of the new operating system. Estrada was specifically told by the Fry's employee that installing the new operating system would delete old data. Estrada never told Fry's she wanted to save any of the old data. Prior to having the new operating system installed, Estrada successfully backed up the entire hard drive on disk, which she had given to Toledano. Toledano would not permit Estrada to answer questions concerning when she gave him the complete backup disk. When Estrada got her computer back from Fry's she never attempted to reinstall the data from her backup disk.[3]

[3] Following oral argument and submission of this appeal, the court received a letter from Estrada in which she asks that we take judicial notice of Microsoft's

On October 26, the court ruled on the first motion for terminating sanctions. It ordered that due to Estrada's refusal to respond to discovery, she was precluded from introducing evidence of suffering emotional distress and resulting damages at trial. In ruling, the court observed Estrada through her attorney had been put on notice in the January discovery requests about production of the computer hard drive and told to not modify the computer in any way. It was not until months later that Estrada produced her computer. Estrada admitted that before producing it, she had taken to the computer to Fry's and had a new operating system installed with full knowledge doing so would delete information from the hard drive. The court found it egregious that Toledano had emphatically denied a new operating system had been installed on the computer, and had accused Defendants' expert of having damaged the hard drive (using that as an excuse to refuse to provide his list of objections to the files Defendants expert was able to copy to disk so Defendants could be given the redacted disk), when in fact Estrada had installed a new operating system and Toledano had the backup disk. The court noted Toledano had ample opportunity to alert Defendants' attorney and the court about the backup disk, but he never did so.

In November, Defendants filed a second motion for terminating sanction or issue preclusion sanction. Estrada was still in violation of the June discovery agreement because she was refusing to produce audiotapes (telephone answering machine tapes) of conversations she had with Martinez. Additionally, the court had ordered Estrada to produce receipts and documents concerning trips she had taken with Martinez, but she had not complied.

At a hearing on November 16, the court reconsidered the motion to compel production of the Lopez tape recording and granted the motion ordering Estrada to

---

instructions for reinstalling its operating system on a computer as posted on its Web site. This evidence was not before the trial court, and Estrada offers no justification for providing new evidence and new argument following submission of the appeal. We have disregarded the filing.

produce the tape. It also ordered Estrada to provide further responses to several of Defendants' interrogatories. The court awarded Defendants $1,750 in sanctions. The court rejected the contention that the *Martinez v. Estrada, supra,* G036365, had any collateral estoppel effect on this proceeding.

On December 14, the court ruled on Defendants' second motion for terminating or issue preclusion sanctions. The court found Estrada had failed to comply with its prior discovery orders concerning production of travel receipts and tapes of conversations with Martinez. It ruled Estrada would not be allowed to introduce any of those items in evidence, and the jury would be instructed she possessed those items, withheld them, and it could infer they contain evidence harmful to her case.

On December 17, Defendants filed their third motion for terminating/issue preclusion sanctions. Despite the court's November 16 order compelling Estrada to turn over the Lopez tape recording and further respond to specific interrogatories pertinent to her claim of sexual harassment, she had not produced the tape or responded to the interrogatories. In Estrada's opposition, Toledano argued sanctions were inappropriate because Defendants' counsel, Harris, had not "reminded" him of the need to comply with the order compelling further responses. And in any event, he again argued none of the discovery was proper because of the collateral estoppel effect of *Martinez v. Estrada, supra,* G036365, on liability, thus the items sought had no relevance.

Also on December 17, Defendants filed another motion to compel production of photographs of Estrada with Martinez. Estrada had agreed at that time to produce all photographs. At her October 15, 2007, deposition, Estrada admitted she had a power point disk containing more photographs of Martinez that she had not produced. Estrada had the disk with her but would not permit Defendants to make a copy of the disk at the time. Estrada's attorney agreed to provide Defendants with a copy of the disk but later refused to do so. In her opposition, Estrada argued Defendants were not entitled to

discovery of any additional photographs because of the collateral estoppel effect of *Martinez v. Estrada*, *supra,* G036365, on liability.

On January 11, 2008, the court granted Defendants' motion for terminating sanctions and dismissed the action as a sanction for Estrada's continued discovery abuses. The court noted that despite prior orders compelling discovery, issue preclusion sanctions, and monetary sanctions, Estrada continued to disobey court orders concerning discovery. A judgment dismissing the action was entered, and Defendants were awarded $35,805 in costs.

II

COLLATERAL ESTOPPEL

Estrada contends the judgment in her favor in *Martinez v. Estrada*, *supra*, G036365, rejecting Martinez's application for an antiharassment injunction, is entitled to collateral estoppel effect and is dispositive of *all* liability issues against *all* defendants in this case. She asserts the Defendants were not entitled to any of the discovery they sought and, thus, the trial courts' numerous discovery and sanctions orders were in error and she was not required to comply with them. Needless to say, she is wrong.

"Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata '"precludes parties or their privies from relitigating a cause of action [finally resolved in a prior proceeding]."' [Citations.] But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an issue '"necessarily decided in [prior] litigation [may be] conclusively determined as [against] the parties [thereto] or their privies . . . in a subsequent lawsuit on a different cause of action."' [Citation.] [¶] Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing issues therein decided against him, even when those issues bear on different claims raised in a later case. . . ." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-820, italics omitted.)

"Collateral estoppel (like the narrower 'claim preclusion' aspect of res judicata) is intended to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation. [Citation.]" (*Ibid.*) "Whether collateral estoppel is fair and consistent with public policy in a particular case depends in part upon the character of the forum that first decided the issue later sought to be foreclosed. In this regard, courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings. [Citations.]" (*Ibid.*)

The judgment in Estrada's favor in the antiharassment action does not collaterally estop Defendants from defending themselves in this civil damages action. In the prior action, Martinez sought an injunction against Estrada under section 527.6, prohibiting alleged harassment by Estrada. Martinez was not successful, and the court made findings based on the evidence presented in that proceeding that Martinez was the aggressor, not Estrada.

But it simply cannot be said that in the section 527.6 proceeding there was a full opportunity for Martinez (not to mention the other defendants) to conduct discovery and fully litigate the issues presented in this case as Estrada contends. Section 527.6 establishes a special procedure intended to provide rapid injunctive relief to persons who have suffered harassment. (*Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811 (*Byers*).) The statute is designed to adjudicate claims of harassment in an expedited fashion, normally on a schedule lasting no more than 22 days from start to finish.[4] (§ 527.6, subd. (c); see *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 649 (*Thomas*).)

---

[4] Section 527.6 provides in pertinent part: "(a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section. [¶] (b) For the purposes of this section, 'harassment' is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress,

Although the trial court in an antiharassment proceeding must "receive any testimony that is relevant" at the hearing (§ 527.6, subd. (d)), there is no right to conduct discovery in a proceeding under section 527.6. (*Thomas*, *supra*, 126 Cal.App.4th at p. 650, fn. 11; see generally *Byers*, *supra*, 57 Cal.App.4th at pp. 811-812.) Indeed, Judge Flynn, the trial judge in the antiharassment proceeding, specifically reminded the litigants' attorneys, when questioning witnesses, about the specialized nature of the section 527.6 proceeding and admonished, "I'll give you certain leeway, but please don't use this [proceeding] as a discovery tool for anything that might be coming down the road." In short, the judgment in *Martinez v. Estrada*, *supra*, G036365, was not a reason for denying Defendants discovery in this case.

III

DISCOVERY SANCTIONS

A. Standard of Review

Estrada makes a series of arguments in an attempt to demonstrate the trial court abused its discretion in imposing the monetary sanctions against her attorney and the issue preclusion sanctions that lead to a terminating sanction. "The court's discretion to impose discovery sanctions is broad, subject to reversal only for manifest abuse exceeding the bounds of reason. [Citations.]" (*American Home Assurance Co. v. Société*

---

and must actually cause substantial emotional distress to the plaintiff. [¶] . . . [¶] (c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order . . . . [¶] (d) Within 15 days, or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction. The defendant may file a response that explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint under this section. At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section."

Commerciale Toutélectric (2002) 104 Cal.App.4th 406, 435.) Furthermore, "A decision to impose the ultimate sanction—a judgment in the opposing party's favor—should not be made lightly. 'But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.' [Citation.] Here, the record provides ample support for the trial court's actions." (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 297, fn. omitted.)

B. Monetary Sanctions

Estrada contends the trial court abused its discretion each time it imposed monetary sanctions against her attorney, Toledano. We disagree.

1. April 27, 2007: $750 Sanction

On April 27, 2007, Judge Thompson ruled Defendants' motions to compel Estrada to respond to the first round of discovery requests were moot because she served responses the day before the hearing, but it ordered Estrada's attorney to pay sanctions of $750. Estrada contends the court abused its discretion because her attorney was justified in not timely responding to the discovery requests due to his father's death.

Preliminarily, the sanctions order is not reviewable on this appeal. Only the person against whom sanctions are imposed may challenge the order. Section 904.1, subdivision (b), provides "[s]anction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action." The provision that the sanction order may be reviewed on appeal by "that party" has reference to the party against whom the sanction was imposed." (*Imuta v. Nakano* (1991) 233 Cal.App.3d 1570, 1585-1586.) An attorney who is personally subject to sanctions has a distinct and separate right to appeal a sanctions order. (*Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 645, fn. 1.) When the order sanctions the attorney but not the client, the attorney, not the client, must file a timely notice of appeal from the order

(*20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42 (*Calhoun*)), and the client has no standing to raise a challenge to the order on behalf of the attorney. (*Calhoun, supra,* 20 Cal.App.4th at p. 42 [right of appeal vested in attorney, not client].) Only Estrada has appealed and she lacks standing to challenge a monetary sanction that was imposed only against her attorney. (*Ibid.* [absent attempt by attorney, not party, to file an appeal, ruling not reviewable]; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 761 [no jurisdiction to review portion of sanction order applicable to counsel because attorney did not include himself in notice of appeal].)

Furthermore, we cannot say Judge Thompson abused his discretion in imposing the $750 monetary sanction against Estrada's attorney. When a party successfully moves for an order compelling response to interrogatories, "[t]he court *shall* impose a monetary sanction . . . unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2030.290, subd. (c), italics added.) The discovery requests were served on January 22 and responses were due February 23. Estrada's attorney asked for an extension because his father died 10 days after discovery had been served (i.e., early February). Defense counsel obliged extending time to the middle of March. Defense counsel declined Toledano's request for a further extension to March 30, after which Toledano indicated he would not provide discovery responses because he was too busy with other cases and attending to matters pertaining to settling his father's estate. But the trial court could easily conclude that even the proposed March 30 date for responding was without meaning to Toledano because still no responses were served until almost a month after that date—just the day before the hearing on Defendants' motion to compel. The court did not abuse its discretion concluding the failure to timely comply with discovery requests was not substantially justified.

The fact that two months after imposing this first monetary sanction, the court granted Estrada's motion to be relieved of her waiver of her rights to object to discovery by failing to timely respond, does not change our conclusion, as they involve different standards. A party waives the right to object to discovery by failing to serve a timely response, but the court may relieve the party of that waiver if it finds "mistake, inadvertence, or excusable neglect." (§ 2030.290, subd. (a)(1) & (2).) But the discovery sanctions are mandatory for having forced a party to file a motion to compel to get the responses in the first place unless the failure to respond was "substantial[ly] justif[ied]." (§ 2030.290, subd. (c).) A mistake or an attorney's neglect is not tantamount to substantial justification for failing to comply with discovery requests.

2. September 28, 2007: $2,340 Sanction

On September 28, 2007, Judge Thompson granted Defendants' motion to compel production of photograph negatives, and imposed $2,340 in sanctions against Toledano. Estrada contends the sanction is unjustified. As with the April 27 sanction order, Estrada lacks standing to challenge this sanction award because it is against her attorney only, and he has not appealed. (*Calhoun*, *supra*, 20 Cal.App.4th at p. 42.) Furthermore, her argument is without merit—the sanction was justified.

Defendants requested Estrada produce all photographs she had of Martinez. Estrada agreed to produce the documents, and brought some photographs to her deposition, but Estrada admitted she had additional negatives with images of Martinez she had not produced. Despite Defendants' repeated requests for the additional negatives, Estrada continued to refuse to produce them. Defendants filed a motion to compel production of the negatives, which Estrada opposed. The court granted the motion to compel, ordering Estrada to produce the negatives by October 8, but still she did not produce them.

Estrada offers no legal argument or citation to authorities supporting her contention imposition of sanctions was an abuse of discretion. Accordingly, we may

treat the argument as waived. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*).) Furthermore, section 2031.320, subdivision (b), provides, "[t]he court *shall* impose a monetary sanction . . . against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel" compliance with a document production request unless the person "acted with substantial justification" or "other circumstances make the imposition of the sanction unjust." Sanctions were mandatory unless Estrada demonstrated her refusal to produce the negatives was justified. She did not, and thus sanctions were appropriate.

3. November 16, 2007: $1,750 Sanction

Estrada contends Judge Chaffee's November 16, 2007, order imposing $1,750 in sanctions against her attorney was also improper. We disagree.

Again, Estrada lacks standing to challenge a sanction imposed only against her attorney. (*Calhoun, supra,* 20 Cal.App.4th at p. 42.) Furthermore, the argument is without merit. Estrada argues the sanction was improperly imposed for having raised her collateral estoppel objection to the discovery Defendants sought. She engages in no legal analysis and cites no legal authority to support her argument and for that reason we may treat it as waived. (*Kim, supra,* 17 Cal.App.4th at p. 979.) Furthermore, nothing in the record suggests the sanction was imposed for the reason Estrada suggests. It was imposed because the court granted Defendants' motions to compel production of the Lopez tape recording and to compel further responses to interrogatories, all of which were motions that Estrada unsuccessfully opposed. Estrada does not argue she demonstrated below that her opposition to those motions was substantially justified, thus sanctions were appropriate. (§§ 2030.290, subd. (c), 2031.320, subd. (b).)

C. First Issue Preclusion Sanction: Alteration of Computer Hard Drive

The trial court granted Defendants' first motion for terminating or issue preclusion sanctions ordering that Estrada would not be permitted to introduce evidence at trial of her emotional distress and resulting damage. Defendants' moved for the

sanction on the grounds of Estrada's willful misuse of the discovery process. (§ 2023.030.) Specifically, they argued that despite court orders compelling her to respond to interrogatories, Estrada still refused to respond to interrogatories asking her to identify doctors who had treated her and witnesses to her claimed emotional distress. She had threatened to not appear at her rescheduled deposition. And, she had altered the hard drive on her computer. Estrada contends the sanction order was an abuse of discretion because there was no evidence supporting the conclusion she damaged or destroyed potential evidence. She is wrong.

"Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation. [Citations.] Such conduct is condemned because it 'can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.' [Citation.] While there is no tort cause of action for the intentional destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions. [Citations.] A terminating sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence. [Citation.]" (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*).)

Estrada contends sanctions were inappropriate because there is no evidence her "utterly innocuous" act of having her computer fixed by installing a new operating system damaged or destroyed any relevant evidence that might have been on her computer. She asserts that absent direct proof by Defendants that the evidence they sought from Estrada's computer (e.g., poems, letters, & digitally stored photographs), had actually existed on the computer hard drive prior to installation of the new operating

system and were damaged or destroyed as a result of installation of the new operating system, Defendants' claim of spoliation fails.

"We review the trial court's order under the abuse of discretion standard and resolve all evidentiary conflicts most favorably to the trial court's ruling. We will reverse only if the trial court's order was arbitrary, capricious, or whimsical. It is appellant's burden to affirmatively demonstrate error and where the evidence is in conflict, we will affirm the trial court's findings. [Citation.] We presume the trial court's order was correct and indulge all presumptions and intendments in its favor on matters as to which it is silent. [Citation.]" (*Williams, supra,* 167 Cal.App.4th at p. 1224.)

The evidence supports the trial court's conclusion Estrada willfully damaged or destroyed potential evidence and that she and her attorney egregiously misused the discovery process. Estrada's attorney had been informally alerted by defense counsel that discovery of Estrada's home computer would be sought, and he agreed she would not alter or tamper with the computer. Estrada's home computer was requested in Defendants' January 2007 discovery requests. Defense counsel explained the relevance of the home computer—it potentially contained poems and letters written to Martinez as well as photographs of Martinez, which could cast doubt on Estrada's claim the women's relationship had been coerced, and Estrada has never denied that such documents exited. The computer was not produced. Defendants brought a motion to compel its production, but the motion was taken off calendar when Estrada stipulated to produce the computer by June 30 (for copying of the hard drive) and an elaborate protocol was established. Defendants' computer expert was to copy the hard drive onto a disk, give the disk to Toledano who was to identify any objectionable files (e.g., privileged) and give that list to the defense expert. The defense expert was then to make a redacted version of the hard drive copy to give to defense counsel.

The defense expert discovered a new operating system had been recently installed on the computer and explained to counsel this made recovery of documents

predating the new operating system very difficult. In a subsequent declaration, the defense expert explained operation of the new operating system pushed the old data into unallocated space on the hard drive and "overwrote portions of the hard drive, making files that existed before reformatting more difficult, and in some cases, impossible to view." When he finally was able to provide Toledano with all the copied data, Toledano refused to provide his list of objectionable files complaining the disk was unreadable. He repeatedly and emphatically denied in court papers, under penalty of perjury, that Estrada had done anything to her computer and accused the defense expert of having damaged the hard drive. But then, Estrada admitted at her deposition that in February or March 2007—after discovery had been propounded—she had a new operating system installed knowing that doing so would delete existing data. Furthermore, Estrada had backed up her hard drive prior to installing the new operating system but never attempted to reinstall her old files. Toledano had been in possession of the full backup disk, and never advised opposing counsel or the court he had the disk.

Estrada argues there is no competent evidence demonstrating that installing the new operating system could have affected any of the old data on the computer because there was no showing the defense expert was qualified to arrive at such a conclusion. Estrada raised no such objections below and cannot do so now. (Evid. Code, § 353.) Furthermore, the argument ignores her own testimony that she was specifically told before having the new operating system installed that doing so would delete old files.

Estrada's contention Defendants had to affirmatively prove there were relevant documents that had been destroyed is also meritless. Defendants explained the potential relevance of Estrada's computer (files containing poems, letters & photographs), and Estrada never denied such documents had been on her computer, never objected to Defendants' request for the computer, and stipulated she would produce it. "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were *potentially* relevant to the litigation before they were

destroyed.' [Citations.] Moreover, because 'the relevance of . . . [destroyed] documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents.' [Citation.]" (*Leon v. IDX Systems Corp.* (9th Cir. 2006) 464 F.3d 951, 959.)

D. Terminating Sanction

Estrada does little to challenge the imposition of the terminating sanction dismissing her action, other than to refer back to her arguments that Defendants had no right to the evidence they sought (i.e., the collateral estoppel argument), and that the earlier lesser sanction orders were improper. We have already rejected those contentions.

Section 2023.030, subdivision (d), allows the trial court to impose a terminating sanction when there has been a misuse of the discovery process. "Misuses of the discovery process include . . . : [¶] . . . [¶] (d) Failing to respond or to submit to an authorized method of discovery. [¶] (e) Making, without substantial justification, an unmeritorious objection to discovery. [¶] (f) Making an evasive response to discovery. [¶] (g) Disobeying a court order to provide discovery. [¶] (h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery. . . ." (§ 2023.010.) Although "terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party[,]" as with other discovery sanctions, they are reviewed for abuse of discretion. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.)

We cannot say the trial court abused its discretion in issuing the terminating sanction. The court repeatedly ordered Estrada to comply with discovery requests, but she did not. It had already imposed three monetary sanctions against Toledano (none of which were paid), for failing to comply with discovery requests and damaging or destroying evidence. Defendants' motion for terminating sanctions was premised on Estrada's most recent flaunting of court orders—despite the court's order compelling

Estrada to turn over the Lopez tape recording and further respond to specific interrogatories pertinent to her claim of sexual harassment, she had not produced the tape or responded to the interrogatories. And, as explained in Defendants contemporaneously filed motion to compel, despite her agreement to produce photographs, and court orders compelling her to produce the negatives, Estrada admitted she had disks of previously unproduced photographs of Martinez, and was refusing to provide a copy of the disk.

In her opening brief, Estrada concedes she "did indeed persistently object to discovery, and repeatedly filed legal memoranda taking positions in regard to discovery with which the trial court disagreed . . . ." But what she does not acknowledge is that even after the trial court repeatedly rejected her objections to Defendants' discovery requests, ordered her to comply with discovery requests, and sanctioned her attorney, she still would not comply with the court orders and resisted further efforts by Defendants to obtain discovery. Under the circumstances, the terminating sanction was not an abuse of discretion.

IV

MOTIONS FOR SANCTIONS ON APPEAL

After filing her reply brief, Estrada filed a motion for sanctions against Defendants' attorneys under California Rules of Court, rule 8.276(a). She argues the respondents' brief on appeal violates California Rules of Court, rule 8.204(a)(1), regarding the contents of appellate briefs. Estrada complains the Respondents' brief does not separate each argument under separate headings but instead intertwines legal arguments with its recitation of facts, impermissibly "rehashes" the arguments Defendants made in the trial court, and does not contain adequate citations to the record.

As a sanction, Estrada is asking that we award her $52,950 in attorney fees, representing the 141.2 hours her attorney billed her for preparing her reply brief. She asserts her attorney was required to go "over and over" the Respondents' brief to make sure there was not a significant legal point buried in it somewhere, and to review her own

appellant's appendix repeatedly to make sure there was nothing in the record that might support assertions in the Respondents' brief.

Defendants, in turn, have filed their own motion for sanctions against Estrada for filing a frivolous motion for sanctions (Cal. Rules of Court, rule 8.276(a)(3) & (4)), and seek an award of the $5,625 in attorney fees incurred for reviewing and responding to Estrada's motion for sanctions. They also move for sanctions against Estrada for her own violations of court rules in preparing her opening brief, and seek as a sanction the $16,425 in attorney fees incurred for preparing the Respondents' brief. The latter request is untimely. (Cal. Rules of Court, rule 8.276(b)(1) [motion for request for sanctions due no later than 10 days after reply brief due].)

We have extensively reviewed the entire appellate record and all the briefs in this matter. We find nothing in the authors' transgressions so egregious as to merit imposition of sanctions. We deny the sanction motions.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.